No 83-1527

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a warrantless search of petitioner's truck violated his Fourth Amendment rights because exigent circumstances precluding an application for a warrant did not exist at the time of the search.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 716 F.2d 826.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1983. A petition for rehearing was denied on November 17, 1983. The petition for a writ of certiorari was filed on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A19).

The pertinent evidence is summarized in the opinion of the court of appeals (Pet. App. A7-A11). On the evening of July 28, 1982, DEA agents in Tampa, Florida, placed James Wolfe, a suspected drug smuggler and dealer, under observation after Wolfe arrived in Tampa on a flight originating in Minneapolis. Upon landing, Wolfe hailed a cab, which took him to a gas station in Sarasota, where he placed a telephone call (S.H. Tr. 50-56; Tr. 72-77).[1] Shortly after midnight, Wolfe left the gas station in a gray Buick that agents later determined was registered to petitioner. An hour later, the Buick arrived at an Econo Lodge Motel in Sarasota and was parked near a Ryder Rental Truck that petitioner had rented the day before (S.H. Tr. 57-59, 65; Tr. 77-80, 86).

At 2:30 a.m. on July 29, 1982, an unidentified person drove the Buick from the motel to a residence on Siesta Key, returning to the motel at 10:30 a.m. Later that morning, two men drove the Buick to the motel office. Agents observed petitioner leave the car and enter the office. After petitioner re-entered the car, the two men drove to a nearby restaurant and then returned to the motel parking lot. Petitioner then left the Buick and entered the Ryder truck. The Buick and the truck then were driven to a private residence south of Coleman, Florida (S.H. Tr. 60-67, 184, 187; Tr. 81-88, 108-109).

As the surveillance agents conferred in a nearby roadside park, a black Cadillac registered to petitioner's father left the residence and drove slowly around the agents' cars before returning to the house (S.H. Tr. 68; Tr. 88-89, 138). Five or ten minutes later, the Ryder truck, driven by petitioner, and a blue Chevrolet registered to petitioner's

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[1] "S.H. Tr." refers to the transcript of the suppression hearing; "Tr." denotes the trial transcript.

brother were seen leaving the residence. Petitioner soon exceeded the 55 mph speed limit, but surveilling agents were unable to follow him because of obstructive maneuvers by the Chevrolet. The agents eventually were able to pass the Chevrolet, caught up with the truck, and followed it to a shopping center in Eustis, Florida (S.H. Tr. 68, 78-83; Tr. 119-124).

Petitioner parked the truck in an isolated area of the parking lot and entered a nearby McDonald's restaurant (S.H. Tr. 83-84; Tr. 125). While petitioner sat in the restaurant, keeping the truck in view, DEA Agent Adams walked past the rear of the truck and smelled the odor of marijuana. She then returned to her car and advised DEA Agent Serra of her discovery. Serra left the parking lot to call the United States Attorney.

After an hour, petitioner left the restaurant and made several telephone calls at the shopping center. Forty-five minutes later, an individual in a white car arrived at the parking lot, picked up petitioner, and drove off. All surveilling agents but one, who was posted to maintain guard over the truck, followed the white car. Agent Adams asked a Florida Highway Patrol trooper to stop the white car so that he could ascertain petitioner's identity (S.H. Tr. 164-166; Tr. 142-144). After petitioner identified himself, the trooper at first permitted him to leave, but then stopped the vehicle a second time at Agent Serra's direction. The agents then advised petitioner that he was not under arrest but requested that he nonetheless return to the parking lot. Petitioner agreed to do so (S.H. Tr. 12-19, 88-89, 92-94, 166; Tr. 127-128, 144, 159).

Approaching the truck, petitioner asked Agent Serra what he smelled and he held out his hands, simulating the handcuff position, saying "arrest me, arrest me." Serra then opened the rear door of the truck, revealing approximately 3000 pounds of marijuana (S.H. Tr. 94-96; Tr. 129-134).

ARGUMENT

Petitioner does not question that there was probable cause to believe that the truck contained marijuana. Rather, because he was under surveillance from the time agents acquired probable cause to search the truck until they actually conducted the search several hours later, petitioner contends (Pet. 11-16) that there was no danger that the truck might be moved or the contraband destroyed pending acquisition of a search warrant and that the warrantless search of the truck accordingly was impermissible. Petitioner's claim is meritless.

1. a. Contrary to petitioner's apparent submission (Pet. 13), the automobile search exception to the Fourth Amendment warrant requirement does not require a showing of exigent circumstances at the time of the *search* or that it was infeasible to obtain a warrant by the time the search was conducted. The inherent mobility of motor vehicles is often cited as a basis for the auto search doctrine, which permits warrantless probable cause searches of motor vehicles. As the court of appeals recognized (Pet. App. A16), however, it is well established that it is the mobility of the vehicle at the time of the seizure, rather than at the time of the search that is the predicate for the application of the automobile exception. See *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). Moreover, this Court has also recognized a second rationale for the auto search doctrine — the owner's dimished expectation of privacy in an automobile — that justifies "warrantless searches of vehicles * * * in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed [are] remote, if not nonexistent." *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973). Accordingly, the court of appeals correctly recognized that there was no need

for the government to demonstrate that exigent circumstances requiring an immediate search prevailed at the time of the warrantless search at petitioner's truck. Moreover, "[i]t is no answer to say that the [agents] could have obtained a search warrant, for '[t]he relevant test is not whether it [was] reasonable to procure a search warrant, but whether the search was reasonable.' " *Cooper* v. *California*, 386 U.S. 58, 62 (1967), quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950).

b. Petitioner argues (Pet. 13-14) that there was no justification for the warrantless search here because, at the time his truck was seized, it had already been effectively immobilized because the truck was parked and he was under police surveillance. The court of appeals determined, however, that "[a]t the time law enforcement officials seized [petitioner's] truck, there may still have been a danger that the vehicle or its contents would be moved before the officers obtained a valid search warrant" (Pet. App. A17). There is no warrant for further review of this fact-bound determination. In any event, because the record clearly reveals that petitioner was associated with a number of confederates—and appears to have alerted them by telephone that he was (or suspected he was) under police surveillance — the court of appeals' assessment of the situation is sound.[2]

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[2]The court of appeals did not indicate whether, in its view, petitioner's vehicle had been effectively seized prior to the time it was searched by Agent Serra. Nor does petitioner address this question. But even if the seizure was coincident with the initiation of the search — the interpretation of the facts most favorable to petitioner — the warrantless search was justified because the possibility that the truck or the contraband might be moved before a warrant could be obtained persisted up until the point of the search.

We note that, because the court of appeals justifiably found a continuing risk of loss of the vehicle or evidence at the time the vehicle was seized, this case does not present any question as to whether, in the absence of any such possibility, a warrantless search may be justified

2. Petitioner claims (Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Fogelman*, 586 F.2d 337, 342-343 (5th Cir. 1978), in which an exigent circumstances rationale for a warrantless search of two trucks was rejected because the drivers were in custody and the vehicles surrounded by numerous officers at the time of the *seizure*.[3] As noted above, the record of the present case, by contrast, does not reveal that agents had such absolute control of the situation as to eliminate all exigency considerations at the time of the seizure of the vehicle. In any event, as the Fifth Circuit subsequently recognized, *Fogelman* takes an unduly restrictive view of the ambit of the automobile search doctrine that is inconsistent with this Court's recent automobile search decisions. See *United States* v. *McBee*, 659 F.2d 1302, 1305 & n.3 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Accordingly, no conflict of decision warranting further review is presented.

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solely on the basis of the diminished expectation of privacy that individuals enjoy in their automobiles. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 458-462 (1971). The court of appeals' opinion thus does not join issue on petitioner's implicit contention that a showing of exigency or mobility prevailing at the time of a seizure remains essential to the automobile exception to the warrant requirement.

[3]The warrantless search in *Fogelman* was upheld on alternative grounds. The court's discussion of the auto search doctrine accordingly was unnecessary to the decision and may be considered dictum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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